18-397

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

STUART FORCE, individually and as Administrator on behalf of the ESTATE OF TAYLOR FORCE, ROBBI FORCE, KRISTIN ANN FORCE, ABRAHAM RON FRAENKEL, individually and as Administrator on behalf of the ESTATE OF YAAKOV NAFTALI FRAENKEL, and as the natural and legal guardian of minor plaintiffs A.H.H.F, A.L.F, N.E.F, N.S.F, and S.R.F., A.H.H.F., A.L.F., N.E.F., N.S.F., S.R.F., RACHEL DEVORA SPRECHER FRAENKEL, individually and as Administrator on behalf of the ESTATE OF YAAKOV NAFTALI FRAENKEL and as the natural and legal guardian of minor plaintiffs A.H.H.F, A.L.F, N.E.F, N.S.F, and S.R.F., TZVI AMITAY FRAENKEL, SHMUEL ELIMELECH BRAUN, individually and as Administrator on behalf of the ESTATE OF CHAYA ZISSEL BRAUN, CHANA

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLEE

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Plaintiffs-Appellants,

—against—

FACEBOOK, INC.,

Defendant-Appellee.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, I hereby certify that Appellee Facebook, Inc. is a publicly traded corporation principally engaged in providing and maintaining a social-networking service. No parent corporation or publicly held corporation owns 10 percent or more of its stock.

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STATEMENT OF JURISDICTION

The District Court had subject matter jurisdiction under 28 U.S.C. § 1331 and 18 U.S.C. § 2333. The District Court entered a final judgment on January 18, 2018, and Appellants filed a timely notice of appeal on February 8, 2018. A408–32, A433–34.

This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether § 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230, bars Appellants' claims under Israeli tort law and the Anti-Terrorism Act ("ATA"), 18 U.S.C. § 2333, *et seq*.

2. Whether, irrespective of the application of § 230, Appellants' ATA claims fail as a matter of law.

INTRODUCTION

This case involves allegations about content posted on Facebook by a third party—the terrorist group HAMAS—and Facebook's alleged failure to remove or block that content. The Amended Complaint claims that "HAMAS has used Facebook to disseminate propaganda and messages to its followers and the public," A37 ¶ 130, and further alleges that Facebook has "refused to actively monitor its online social media network to block HAMAS's use of Facebook" and to "flag, review, and remove HAMAS Facebook accounts," A121 ¶¶ 543, 547. These allegations bring this case squarely within the immunity afforded by § 230 of the Communications Decency Act ("CDA"), 47 U.S.C. § 230, which bars claims seeking to hold interactive-computer-service providers like Facebook liable for the content posted on their platforms by third-party users. *See, e.g.*, *Ricci v. Teamsters Union Local 456*, 781 F.3d 25, 28 (2d Cir. 2015) (per curiam); *Klayman v. Zuckerberg*, 753 F.3d 1354, 1359 (D.C. Cir. 2014). The District Court properly applied this settled law to dismiss the Amended Complaint and was on equally solid ground in rejecting Appellants' unpersuasive efforts, which are repeated on

appeal, to cast this case as something other than a complaint about Facebook's handling of third-party content on its platform.

Perhaps recognizing the legal hurdle the CDA imposes for their claims, Appellants make a number of flawed arguments that the CDA does not apply. ***First***, Appellants are wrong that an affirmative defense like the CDA cannot be resolved on a motion to dismiss. Courts routinely grant such motions where an affirmative defense is legally established on the face of the complaint and frequently do so in CDA cases. *See, e.g.*, *Ricci*, 781 F.3d at 28; *Klayman*, 753 F.3d at 1357. ***Second***, Appellants' reliance on the doctrine barring extraterritorial application of U.S. laws is misplaced. The focus of the CDA is domestic: it creates an immunity from suit in U.S. courts. There is simply no extraterritoriality issue because the regulated conduct is the filing of a lawsuit, a domestic act, not whatever conduct forms the basis of the underlying lawsuit. *See* A212–13. And ***third***, there is no textual basis and Appellants cite no authority for excluding Anti-Terrorism Act ("ATA") or foreign-law claims from application of the CDA. The judgment dismissing this case should therefore be affirmed.

While the CDA provides ample basis for affirming the District Court in full, this Court may affirm dismissal of the ATA claims on the alternative ground that they fail to state a claim. ***First***, none of the four ATA counts plausibly set forth any facts or theory to substantiate the claim that Facebook was the proximate cause of the terrorist attacks identified in the Amended Complaint. ***Second***, the fact that HAMAS members created accounts on Facebook's open platform cannot, as a matter of law, give rise to direct liability for "knowing" acts of international terrorism by Facebook. And ***finally***, as to secondary liability under the ATA, the Amended Complaint contains no plausible allegations that Facebook aided and abetted, or conspired with, HAMAS in carrying out terrorist attacks.

The District Court was correct to dismiss this case. Facebook has been consistent that there is no room for terrorists or terrorist activity on its platform. Facebook empathizes with all victims of terrorism and takes steps every day to rid Facebook of terrorist content. But the allegations in the Amended Complaint are meritless. The CDA protects neutral platforms like Facebook from suit over content posted by third parties and Facebook's efforts to remove it; and in any event Facebook neither

engaged in nor supported any terrorist activity within the meaning of any applicable provision of the ATA. Accordingly, this Court should affirm the District Court's decision granting Facebook's motion to dismiss.

STATEMENT OF THE CASE

Facebook enables people, businesses, and organizations to connect and share content with billions of other people around the world. *See* A29–30 ¶¶ 91–94. Users can view content shared by others on one or more of the hundreds of millions of Facebook pages maintained on the platform. To access Facebook, a user must open an account and agree to abide by the terms of service, including a set of Community Standards. Those Community Standards, which are incorporated by reference into the Amended Complaint, state that Facebook "do[es] not allow any organizations or individuals that are engaged in," among other things, "[t]errorist activity" or "[m]ass or serial murder" to "have a presence on Facebook." Facebook, *Community Standards*, https://www.facebook.com/communitystandards/ (last accessed Oct. 2, 2018). Facebook also "remove[s] content that expresses support or praise for [terrorist] groups, leaders, or individuals." *Id.* Terrorist organizations are therefore not permitted to maintain an account, page,

or group on Facebook, and Facebook does not allow content that praises terrorists or terrorist acts.

Appellants are the relatives of American citizens killed or injured in terror attacks linked to HAMAS, along with one American citizen who survived such an attack. A15–17 ¶¶ 5–18. They allege that "HAMAS is among the most widely-known Palestinian terrorist organizations in the world," designated by the United States Government as a Foreign Terrorist Organization since 1997. A14 ¶ 2. Appellants further claim that HAMAS "openly maintain[s] . . . Facebook accounts with little or no interference." A14–15 ¶ 3. In Appellants' view, HAMAS "uses Facebook to issue terroristic threats, attract attention to its terror attacks, instill and intensify fear from terror attacks, intimidate and coerce civilian populations," and otherwise "carry out the essential communication components of HAMAS's terror attacks." A32 ¶¶ 112–13.

Appellants filed this lawsuit against Facebook, seeking compensatory damages of "no less than $1 billion," treble damages, punitive damages, and attorneys' fees. A135 at Prayer for Relief. Appellants assert seven claims for relief. Counts I through IV assert claims under the civil remedies provision of the ATA, 18 U.S.C. § 2333,

in which Appellants contend that Facebook aided and abetted, conspired with, and provided material support to HAMAS. A125–29 ¶¶ 561–85. In Counts V through VII, Appellants seek to hold Facebook liable under Israeli law for negligence, breach of statutory duty, and vicarious liability based on the same alleged provision of material support to HAMAS. A130 ¶¶ 594–95; A132–33 ¶ 606; A134 ¶¶ 614, 617. The gravamen of each of these claims is that Facebook should be liable for "providing services to HAMAS," A134 ¶ 617, for failing to "flag, review, and remove HAMAS Facebook accounts," A121 ¶ 543, and for the use of "algorithms . . . to suggest friends, groups, products, services and local events, and target ads that w[ould] be 'as relevant and interesting' as possible to each individual user," including those potentially interested in terrorist content, A119 ¶ 530.

The District Court dismissed the Amended Complaint for failure to state a claim. The court held that all of Appellants' claims were barred by § 230 of the CDA, which "shields defendants who operate certain internet services from liability based on content created by a third party and published, displayed, or issued through the use of the defendant's services." A204. As the court explained, "[w]hile the Force Plaintiffs

attempt[ed] to cast their claims as content-neutral, even the most generous reading of their allegations place[d] them squarely within the coverage of Section 230(c)(1)'s grant of immunity." A207.[1] That was so, the court concluded, because "Facebook's choices as to who may use its platform are inherently bound up in its decisions as to what may be said on its platform, and so liability imposed based on its failure to remove users would equally 'derive[] from [Facebook's] status or conduct as a "publisher or speaker."'" *Id.* (brackets in original) (citation omitted). The District Court further opined that dismissal under the CDA was appropriate because this case "does not require an impermissible extraterritorial application of Section 230(c)(1)," as "the relevant 'territorial events or relationships' occur[red] domestically." A213.

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[1] Appellants contend that the District Court "made specific findings about Facebook's services." Appellants' Br. at 23. That contention is wrong. The court below decided this case on Facebook's motion to dismiss, meaning that the court simply accepted the allegations in the Amended Complaint as true solely for purposes of resolving that motion. *See* A204 ("In reviewing a complaint on . . . a motion [to dismiss], the court must accept as true all allegations of fact, and draw all reasonable inferences in favor of the plaintiff."). The District Court made no "specific findings" about Facebook's services or any other fact in this case.

Appellants filed motions to alter or amend the judgment and for leave file a second amended complaint, which were both denied. *See* A408–32. Addressing many of the same arguments that Appellants now advance on appeal, the District Court rejected Appellants' claims that (1) the CDA does not "apply here because such application 'would be in direct conflict with the ATA,'" A415 (citation omitted); and (2) the CDA does not bar "Israeli-law claims" under the governing conflict-of-laws analysis, A418. This appeal followed.

STANDARD OF REVIEW

This Court reviews *de novo* the dismissal of a complaint for failure to state a claim. *See Cobar v. DEA*, 600 F. App'x 31, 32 (2d Cir. 2015) (summary order). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Nor are "legal conclusion[s] couched as . . . factual allegation[s]" entitled to a presumption of truth. *Id.* (quoting *Twombly*, 550 U.S. at 555).

SUMMARY OF THE ARGUMENT

This Court should affirm the decision below and hold that § 230 of the CDA forecloses Appellants' claims as a matter of law. Section 230 bars any cause of action (1) against a provider of an "interactive computer service"; (2) that seeks to treat that service provider as the "publisher or speaker" of third-party content; (3) where the service provider did not participate in creating the content. 47 U.S.C. § 230. Each of these elements is satisfied here. It is undisputed that Facebook provides an interactive computer service. And by trying to impose liability on Facebook for allegedly not blocking, removing, or adequately screening terrorist accounts and content, Appellants necessarily seek to treat Facebook as the publisher of that content. Finally, the Amended Complaint contains no plausible allegations showing that Facebook itself participated in any way in creating or developing the terrorist content at issue, and Facebook's use of algorithms that allow users to access content and make connections does not render it a content "developer" for purposes of the CDA. The District Court thus correctly held that the Amended Complaint is barred by § 230.

In an effort to escape the CDA's bar on claims of this nature, Appellants make a number of arguments, including (1) that the presumption against extraterritoriality precludes application of CDA immunity, and (2) that this Court should except from CDA coverage claims brought either under the ATA or under foreign law. Those arguments are meritless. This case does not implicate the presumption against extraterritoriality because the purpose of § 230(c)(1) is to bar certain lawsuits, and the application of that bar in this case occurs domestically. Moreover, there is nothing in law or logic that exempts civil ATA or foreign-law claims from CDA immunity. No statutory text or legislative history creates any such exemptions, and there is no statutory conflict that would require this Court to create such exemptions out of whole cloth. To the contrary, other courts have applied CDA immunity without hesitation to civil ATA claims and claims arising out of conduct abroad. This Court should do the same.

Although affirming the District Court's finding of CDA immunity means that this Court need not address the remaining deficiencies in the Amended Complaint, those deficiencies nonetheless provide alternative and independent grounds for affirmance. All four of Appellants' claims

under the ATA fail as a matter of law because the Amended Complaint does not plausibly allege that Appellants' injuries occurred "by reason of" Facebook's activities. 18 U.S.C. § 2333(a). Appellants' claim for direct ATA liability is also legally deficient because Facebook did not knowingly commit an "act of international terrorism." *Id.* Finally, Appellants' claim for secondary liability under the ATA fails because the Amended Complaint does not plausibly allege that Facebook either aided and abetted terrorist organizations or in any way conspired with them. *See* 18 U.S.C. § 2333(d) (2016). For these reasons, too, the decision below should be affirmed.

ARGUMENT

I. SECTION 230 OF THE CDA BARS ALL OF APPELLANTS' CLAIMS AS A MATTER OF LAW.

Section 230 of the CDA bars any cause of action that seeks to hold an interactive-computer-service provider liable for failing to remove or screen content created by a third-party user of the service. Because the theories of liability advanced by Appellants do just that, this Court can affirm the judgment below on this basis alone.

A. The District Court Did Not Err By Determining CDA Immunity At The Pleadings Stage.

There is no merit to Appellants' suggestion that it was inappropriate for the District Court to resolve Facebook's CDA argument at the motion-to-dismiss stage. *See* Appellants' Br. at 36–37. As this Court recently explained, "[a]lthough '[p]reemption under the Communications Decency Act is an affirmative defense, . . . it can still support a motion to dismiss if the statute's barrier to suit is evident from the face of the complaint.'" *Ricci*, 781 F.3d at 28 (second set of brackets and ellipsis in original) (quoting *Klayman*, 753 F.3d at 1357). For the reasons explained below, application of the CDA in this case is clear from the face of the Amended Complaint and does not require further factual development. The District Court thus properly resolved this case on the pleadings, as numerous other courts have done.[2] This conclusion is only

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[2] *See, e.g.*, *Goddard v. Google, Inc.*, 640 F. Supp. 2d 1193, 1196 (N.D. Cal. 2009); *Obado v. Magedson*, 2014 WL 3778261, at *1, *8 (D.N.J. July 31, 2014); *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843, 845–46, 849–50 (W.D. Tex. 2007); *Herrick v. Grindr, LLC*, 306 F. Supp. 3d 579, 584 (S.D.N.Y. 2018); *Franklin v. X Gear 101, LLC*, 2018 WL 3528731, at *19, *21 (S.D.N.Y. July 23, 2018), *R. & R. adopted*, 2018 WL 4103492 (S.D.N.Y. Aug. 28, 2018); *Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964, 966, 971–72 (N.D. Cal. 2016), *later ruling affirmed on other grounds*, 881 F.3d 739 (9th Cir. 2018); *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1153 (N.D. Cal. 2017).

confirmed by the fact that courts have long "aim[ed] to resolve the question of § 230 immunity at the earliest possible stage of the case because that immunity protects websites not only from 'ultimate liability,' but also from 'having to fight costly and protracted legal battles.'" *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 255 (4th Cir. 2009) (citation omitted).

B. Section 230 Immunizes Providers Of Interactive Computer Services From Liability For Content Created By Third-Party Users.

This Court and others have recognized the "expansive[]" immunity afforded by the CDA. *Ricci*, 781 F.3d at 27–28; *see also, e.g.*, *Dowbenko v. Google Inc.*, 582 F. App'x 801, 804 (11th Cir. 2014) (per curiam); *Jones v. Dirty World Entm't Recordings LLC*, 755 F.3d 398, 406–08 (6th Cir. 2014); *Klayman*, 753 F.3d at 1359. Section 230(c)(1) states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1). Among the myriad determinations that courts have viewed as protected under the CDA are those concerning the removal of third-party content, *Ricci*, 781 F.3d at 28, those involving who may use the service, *Fields*, 200 F. Supp. 3d at

971–72, and those pertaining to the "structure and operation" of a website, *Jane Doe No. 1 v. Backpage.com, LLC*, 817 F.3d 12, 21 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 622 (2017).

The broad immunity of § 230 serves important policy goals. Most notably, it "maintain[s] the robust nature of Internet communication," by eliminating "the threat that tort-based lawsuits pose to freedom of speech." *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). As the Fourth Circuit explained:

> It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Id. at 331. In this regard, "Section 230 . . . sought to prevent lawsuits from shutting down websites and other services on the Internet." *Batzel v. Smith*, 333 F.3d 1018, 1028 (9th Cir. 2003). At the same time, § 230 removes disincentives to self-regulation by assuring service providers that they can safely self-police their sites without the specter of liability for their editorial choices. *Zeran*, 129 F.3d at 331; *see also Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1122–23 (9th Cir. 2003) ("Congress

enacted this provision . . . to promote the free exchange of information and ideas over the Internet and to encourage voluntary monitoring for offensive or obscene material.").

In light of those policy goals, numerous Courts of Appeals, including this one, have interpreted § 230(c)(1) broadly to bar all claims seeking to hold a provider of an internet-based service like Facebook liable for speech or information posted on the service by a third-party user. *See, e.g.*, *Doe v. MySpace, Inc.*, 528 F.3d 413, 418 (5th Cir. 2008) ("Congress provided broad immunity under the CDA to Web-based service providers for all claims stemming from their publication of information created by third parties . . . ."); *accord Ricci*, 781 F.3d at 27–28; *Klayman*, 753 F.3d at 1359; *Jones*, 755 F.3d at 406–08, 416–17; *Green v. Am. Online (AOL)*, 318 F.3d 465, 470-71 (3d Cir. 2003); *Zeran*, 129 F.3d at 330–31. Courts have further recognized that failure to apply § 230 as written would "cut the heart out of section 230 by forcing websites to face death by ten thousand duck-bites." *Jones*, 755 F.3d at 408 (citation omitted).[3]

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[3] District courts in this Circuit have likewise applied § 230 to reject claims seeking to impose liability on service providers for third-party content. *See, e.g.*, *Herrick*, 306 F. Supp. 3d at 588–89 (concluding that § 230 bars tort claims against internet-service provider related to abusive accounts operated by third parties); *Franklin*, 2018 WL

C. Section 230 Bars Appellants' Claims As A Matter Of Law.

In light of this well-established body of law, this Court should affirm the dismissal of the Amended Complaint. In determining whether § 230 of the CDA bars a cause of action, courts ask whether (1) the defendant is a "provider . . . of an interactive computer service"; (2) the plaintiff seeks to hold the defendant liable as the "publisher or speaker" of content; and (3) the allegedly harmful content was "provided by another information content provider," not by the defendant. 47 U.S.C. § 230(c)(1); *see also, e.g.*, *Ricci*, 781 F.3d at 27–28; *Klayman*, 753 F.3d at 1357. All three elements are satisfied here.

3528731, at *19 (similar). And several courts have relied on the CDA to dismiss lawsuits against Facebook in circumstances similar to those presented in this case. *See, e.g.*, *Klayman*, 753 F.3d at 1355 (concluding that CDA barred suit for negligence and intentional assault based on Facebook's alleged delay in removing content that "called for Muslims to rise up and kill the Jewish people"); *Sikhs for Justice, Inc. v. Facebook, Inc.*, 697 F. App'x 526, 526 (9th Cir. 2017) (affirming dismissal of discrimination claims because Facebook is "entitled to the immunity conferred under § 230"); *Tetreau v. Facebook, Inc.*, No. 10-4558-CZ (Mich. Cir. Ct. Feb. 23, 2011) (similar); *Finkel v. Facebook, Inc.*, 2009 WL 3240365 (N.Y. Sup. Ct. Sept. 15, 2009) (similar); *Gaston v. Facebook, Inc.*, 2012 WL 629868, at *6–7 (D. Or. Feb. 2, 2012) (similar), *R. & R. adopted*, 2012 WL 610005 (D. Or. Feb. 24, 2012); *Pennie v. Twitter, Inc.*, 281 F. Supp. 3d 874, 875 (N.D. Cal. 2017) (similar); *Gonzalez, Inc.*, 282 F. Supp. 3d at 1153 (similar).

1. Facebook Is an Interactive Computer Service.

It is undisputed that Facebook is an interactive computer service. That is because Facebook offers "a service that provides information to 'multiple users' by giving them 'computer access . . . to a computer server,' 47 U.S.C. § 230(f)(2), namely the servers that host its social networking website." *Klayman*, 753 F.3d at 1357; *see also Sikhs for Justice "SFJ", Inc. v. Facebook, Inc.*, 144 F. Supp. 3d 1088, 1092–96 (N.D. Cal. 2015) (finding that Facebook falls squarely within the protections afforded by the CDA), *aff'd*, 697 F. App'x 526 (9th Cir. 2017); *accord Gaston*, 2012 WL 629868, at *6–7; *Tetreau*, No. 10-4558-CZ; *Finkel*, 2009 WL 3240365.

2. The Amended Complaint Treats Facebook as the Publisher of Third-Party Content.

As the District Court correctly recognized, Appellants' claims seek to treat Facebook as the "publisher or speaker" of third-party content. On appeal, Appellants double down on the same theory of liability that they unsuccessfully advanced below: that "[b]y providing services to Hamas, Facebook is liable under the ATA even if it never communicates any of the Hamas postings to anyone not already part of Hamas, and thus never publicizes them." Appellants' Br. at 51. For at least three reasons, the CDA bars this "provision of services" theory.

First, the CDA forecloses Appellants' theory because, at bottom, it seeks to hold Facebook liable for user-generated content. Appellants' criticism of Facebook's alleged provision of accounts and services to HAMAS operates solely in conjunction with the ***content*** allegedly posted by HAMAS to Facebook. That is precisely why the Amended Complaint is replete with allegations concerning the content posted to Facebook by HAMAS and HAMAS supporters. *See, e.g.*, A37 ¶ 130 ("HAMAS has used Facebook to disseminate propaganda and messages to its followers and the public."); A37–38 ¶¶ 127–34 (alleging that HAMAS has used Facebook accounts to "shar[e] operational and tactical information with its members and followers," "recruit followers," and post "graphic images, videos, and music"); A32 ¶ 113 ("HAMAS uses Facebook's Services to actually carry out the essential communication components of HAMAS's terror attacks."); A32 ¶ 112 ("HAMAS . . . uses Facebook to issue terroristic threats, attract attention to its terror attacks, instill and intensify fear from terror attacks, intimidate and coerce civilian populations, take credit for terror attacks, [and] communicate its desired messages . . . .").

The only reason, in other words, that Appellants object to Facebook's alleged provision of services to HAMAS is because of the content posted by alleged terrorists. But for that content, there would be no alleged harm to Appellants and no basis for the claims that Appellants assert. As the District Court explained:

> Facebook's choices as to who may use its platform are inherently bound up in its decisions as to what may be said on its platform, and so liability imposed based on its failure to remove users would equally "derive[] from [Facebook's] status or conduct as a 'publisher or speaker.'" [*FTC v.*] *LeadClick Media*[*, LLC*], 838 F.3d [158,] 175 [(2d Cir. 2016)] (internal quotation marks and citations omitted).

A207. Only underscoring the point is the fact that establishing the proximate causation element of Appellants' claims necessarily requires that Appellants resort to third-party content. "Facebook's role in publishing that content," in other words, "is . . . an essential causal element of the claims in the Force Complaint." A208.

Thus, despite the fact that they now try to portray their claims as being purely about the "provision of accounts" to HAMAS and HAMAS supporters, Appellants advance the same basic argument that the CDA prohibits: that Facebook is liable for failing to screen and remove objectionable third-party content ***posted on those accounts***. *See, e.g.*,

Zeran, 129 F.3d at 330 ("[L]awsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."); *Jones*, 755 F.3d at 411 ("[A]ny activity that can be boiled down to deciding whether to exclude material that third parties seek to post online is perforce immune under [S]ection 230." (citation omitted)); *Green*, 318 F.3d at 471 (similar).

Second, even if Appellants' theory did not seek to hold Facebook directly liable for third-party content, that theory would still be foreclosed by the CDA because Facebook's decisions as to who may use its platform are shielded from liability by the CDA. Indeed, imposing liability on Facebook based on who it permits to open an account would change not only the content that is posted to Facebook's platform, but also the nature of the platform itself. Such a decision regarding the "structure and operation" of Facebook's platform is thus "no less [a] publisher choice[]" than a decision about whether to withdraw or alter content directly. *Backpage.com*, 817 F.3d at 20–21. That is precisely why the District Court in this case found that "Section 230(c)(1) prevents the . . . editorial decision to allow certain parties to post on a given platform."

A207–08. And it is precisely why every other court to weigh in on this issue has likewise rejected attempts to hold a service provider liable for deciding who can and cannot use the platform. *See Backpage.com*, 817 F.3d at 19–21 (declaring that the CDA bars liability based on the "structure and operation" of a website); *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116, 1121 (N.D. Cal. 2016) (rejecting theory that Twitter "provided material support to ISIS" in the form of "Twitter accounts and direct-messaging services" because the theory sought to "treat [Twitter] as the publisher of ISIS's content"); *Pennie*, 281 F. Supp. 3d at 881 (similar); *Gonzalez*, 282 F. Supp. 3d at 1168 (similar).

3. Facebook Did Not Develop the Terrorist Content at Issue.

Appellants' claims also fit comfortably within the third requirement of the CDA: that the content at issue have been provided by a third-party "information content provider." 47 U.S.C. § 230(c)(1). An interactive-computer-service provider qualifies as an "information content provider" only if it is "responsible, in whole or in part, for the creation or development" of the offending content. *Id.* § 230(f)(3). Here, Facebook had nothing to do with "creat[ing]" or "develop[ing]" the content found on

any HAMAS-related page and the Amended Complaint contains no contrary allegation.

Nonetheless, on appeal, Appellants argue that Facebook qualifies as an "information content provider" of the statements made by HAMAS and its agents because Facebook purportedly uses algorithmic technology (1) to broker connections between, and recommend content to, terrorists and terrorist organizations, and (2) to "influence the intended recipient's response to" other information on the platform. Appellants' Br. at 48–49. According to Appellants, "when third-party content is analyzed by Facebook to suggest new relationships, networking opportunities, stories of interest, etc., Facebook 'develops' the third-party content." *Id.* at 46. Appellants' arguments cannot withstand scrutiny.

First, Appellants' are wrong that Facebook's alleged use of algorithms to recommend posts and accounts to Facebook users is the same as "creat[ing] or develop[ing]" content. A website's use of "neutral tools" to suggest or re-post content does not deprive the site of § 230 immunity. *Jones*, 755 F.3d at 411 (emphasis omitted) (citation omitted). That is because such tools, including the algorithms at issue here, do not themselves create or alter content. Instead, they serve only to suggest,

move, or re-post content created by others. In that sense, the tools operate solely in conjunction with content that third parties choose to publish on the platform. But for that content, Facebook's algorithms would have no function, nor would they cause Appellants any alleged harm. Thus, Facebook's use of such technology does not equate to a "responsib[ility], in whole or in part, for the creation or development" of content that appears on the platform. 47 U.S.C. § 230(f)(3).

For exactly those reasons, courts have consistently rejected the argument that the use of neutral algorithms to suggest or repost content constitutes the "development" of content within the meaning of the CDA. Indeed, as one court put it, the "material contribution" necessary to render a service provider a "develop[er]" of content "does not mean merely taking action that is necessary to the display of allegedly illegal content. Rather, it means being responsible for what makes the displayed content allegedly unlawful." *Gonzalez*, 282 F. Supp. 3d at 1168 (citation omitted); *see also, e.g.*, *Fields*, 217 F. Supp. 3d at 1121; *Pennie*, 281 F. Supp. 3d at 881. Facebook's mere suggestion or re-posting of third-party content through neutral algorithms is simply not "what makes the displayed content allegedly unlawful." *See, e.g.*, *Dowbenko*, 582 F. App'x at 805

(barring an attempt to hold Google liable for allegedly "manipulat[ing] its search results to prominently feature" objectionable content); *Universal Commc'n Sys., Inc. v. Lycos, Inc.*, 478 F.3d 413, 420 (1st Cir. 2007) ("At best, [plaintiff]'s allegations establish that Lycos's conduct may have made it marginally easier for others to develop and disseminate misinformation. That is not enough to overcome Section 230 immunity."); *Levitt v. Yelp! Inc.*, 2011 WL 5079526, at *6 (N.D. Cal. Oct. 26, 2011) ("Plaintiffs' allegations of extortion based on Yelp's alleged manipulation of their review pages—by removing certain reviews and publishing others or changing their order of appearance—falls within the conduct immunized by § 230(c)(1)."), *aff'd*, 765 F.3d 1123 (9th Cir. 2014).

Second, use of algorithms to recommend third-party content to users, which may or may not "influence the intended recipient's response," Appellants' Br. at 48, does not make Facebook an "information content provider." Again, merely suggesting or re-posting such content has nothing to do with its "creation or development," no matter what impact the content may have on users. *Lycos*, 478 F.3d at 420 ("At best, UCS's allegations establish that Lycos's conduct may have made it marginally easier for others to develop and disseminate misinformation.

That is not enough to overcome Section 230 immunity."); *Klayman*, 753 F.3d at 1358 ("[A] website does not create or develop content when it merely provides a neutral means by which third parties can post information of their own independent choosing online."); *Goddard*, 640 F. Supp. 2d at 1196–97 (reasoning that a website is not an information content provider "when it merely provides third parties with neutral tools to create web content, even if the website knows that the third parties are using such tools to create illegal content"). Indeed, "absent substantial affirmative conduct" on the part of the internet-service provider "contribut[ing] to [the] alleged unlawfulness in the [user]'s conduct," Facebook's provision of its services "is fully protected by CDA immunity." *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1174 n.37, 1169 (9th Cir. 2008). No such allegations have been presented here.[4]

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[4] This Court's decision in *LeadClick*—where the Court found that the information content provider LeadClick was "not entitled to immunity because it participated in the development of the deceptive content posted on [its affiliates'] fake news pages"—is a far cry from the instant dispute. 838 F.3d at 176. Not only did LeadClick "recruit[] affiliates . . . that used false news sites," but it also "paid those affiliates to advertise . . . online." *Id.* Moreover, "LeadClick employees occasionally advised affiliates to edit content on affiliate pages to avoid being 'crazy [misleading].'" *Id.* (brackets in original) (citation omitted).

D. The District Court Correctly Held That This Case Does Not Involve An Extraterritorial Application Of The CDA.

In an attempt to avoid the CDA altogether, Appellants claim that the "presumption against extraterritoriality" precludes the application of the CDA in this case. *See* Appellants' Br. at 28–35. According to Appellants, because "***all*** acts occurred overseas and § 230 gives no clear indication of extraterritorial application," the District Court should not have applied the CDA at all. *Id.* at 28–29.

As this Court has long instructed, determining whether a case involves a prohibited extraterritorial application of a statute requires the reviewing court to identify the enactment's "focus," which is, in turn, defined as the "objects of the statute's solicitude." *Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 211 (2d Cir. 2014) (citation omitted); *see also RJR Nabisco, Inc. v. Euro. Community*, 136 S. Ct. 2090, 2101 (2016). If the reviewing court finds that the relevant "territorial events or relationships" that bear on this statutory focus or

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The *LeadClick* court consequently had little trouble recognizing that "LeadClick's role in managing the affiliate network far exceeded that of neutral assistance." *Id.* The Amended Complaint contains no similar allegations with respect to Facebook.

solicitude are domestic, "then the application of the provision is not unlawfully extraterritorial." *Id.* (citing, *inter alia*, *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 267 (2010)).

The fundamental problem with Appellants' contention is this: the "focus" of § 230 of the CDA is on limiting civil liability, not on the "regulation of indecent and objectionable material on the Internet," as Appellants contend. Appellants' Br. at 31–32. That much is clear from the text of § 230 itself, which is plainly focused on shielding service providers from certain forms of civil liability—"No provider or user of an interactive computer service ***shall be treated*** as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1) (emphasis added). Confirming the point, other provisions of § 230 preempt contrary laws, *see* 47 U.S.C. § 230(e)(3), and shield other activities taken by service providers from civil liability, *see id.* § 230(c)(2).

The policy considerations underlying the statute also make clear that Congress sought to limit liability for internet service providers. *See id.* § 230(b)(2) ("It is the policy of the United States . . . to preserve the vibrant and competitive free market that presently exists for the Internet

and other interactive computer services . . . ."). Indeed, in the legislative debates surrounding the CDA, Congress recognized the threat that tort-based lawsuits posed to the freedom of electronic speech, and sought to retain a robust medium for Internet communication. *See* H.R. Rep. No. 104-458, at 194 (1996). As the Fourth Circuit aptly put it:

> Congress' purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Zeran, 129 F.3d at 331.

In light of this clear statutory focus on limiting liability, the District Court correctly held that "the relevant [territorial event or relationship] is that where the grant of immunity is applied, i.e. the situs of the litigation." A212. Indeed, "[g]iven the statutory focus on limiting liability," the court reasoned, "the location of the relevant 'territorial events' or 'relationships' cannot be the place in which the claims arise but

instead must be where redress is sought and immunity is needed." A213. Here, of course, the situs of the litigation is a New York court and therefore the relevant "territorial events or relationships" must occur domestically.

For those reasons, the "presumption against extraterritoriality" has no relevance to this case, which involves a purely domestic application of a U.S. law to a U.S. company in a U.S. court. *See Blazevska v. Raytheon Aircraft Co.*, 522 F.3d 948, 954 (9th Cir. 2008) ("Appellants have failed to show that GARA regulates any non-domestic conduct, because GARA only determines the scope of a manufacturer's liability in American courts."); *see also, e.g.*, *Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 116 (2013). It should thus come as no surprise that both the Ninth and D.C. Circuits have applied the CDA to claims involving content posted abroad. *Klayman*, 753 F.3d at 1356–57; *Carafano*, 339 F.3d at 1120–21; *see also, e.g.*, *Gonzalez*, 282 F. Supp. 3d at 1161–63.

Appellants' criticism of this well-supported analysis misses the mark. They principally complain that the District Court erred because "the focus of the CDA . . . is regulation of indecent and objectionable material on the Internet," not on the "limitation on liability," as the

District Court found. Appellants' Br. at 31–32; A211. But that strained reading of the CDA ignores the fact that while ***other portions*** of the CDA may address and regulate the publication of indecent and objectionable material on the Internet, Congress focused on a different issue in enacting § 230, namely, the chilling effect that tort suits could have on Internet-based free speech. Thus, whatever purpose other provisions of the CDA might serve, courts across the country have agreed that the purpose of § 230 is not difficult to discern: "Congress made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties' potentially injurious messages." *Zeran*, 129 F.3d at 330–31; *see also* A211 ("Th[e] emphasis on immunity over other considerations is clear from the text, and courts interpreting that provision have consistently found [its] plain language focuses on protecting qualified defendants from civil suits."); *Jones*, 755 F.3d at 407 ("At its core, § 230 bars 'lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions'" (citation omitted)); *Parisi v. Sinclair*, 774 F. Supp. 2d 310, 316 (D.D.C. 2011) (Section 230 "sought to encourage the '"vibrant and competitive free market" of ideas on the

Internet[]' by establishing immunity for internet publication of third-party content." (citations omitted)). Tellingly, Appellants do not offer a single decision setting forth a contrary view of the CDA or refusing to apply § 230 to conduct abroad. Section 230 thus requires dismissal of this lawsuit.

E. The District Court Did Not Err In Concluding That The CDA Applies To Civil ATA Claims.

The District Court likewise committed no legal error in finding that the CDA applies to Appellants' civil ATA claims. Appellants advance three arguments in the hopes of undermining that reasoned conclusion: Appellants argue that (1) the CDA expressly disclaims any impact on the enforcement of criminal statutes like the ATA, *see* Appellants' Br. at 52–53; (2) application of the CDA and the case law interpreting it must yield to a later-enacted ATA to the extent a conflict exists, *id.* at 53–56; and (3) the ATA and its amendments impliedly repealed § 230 of the CDA, *id.* at 56. Appellants are mistaken on all fronts.

First, Appellants cannot avoid § 230 immunity by trying to shoehorn their civil ATA claims into the CDA's exception for the "enforcement" of "any . . . Federal criminal statute," 47 U.S.C. § 230(e)(1). Entitled "No effect on criminal law," that exception states:

> Nothing in [§ 230] shall be construed to impair the enforcement of section 223 or 231 of this title, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of Title 18, or any other Federal criminal statute.

Id. On its face, this provision is limited to the enforcement of federal ***criminal*** law. Similarly, the statute's use of the word "enforcement" indicates that the exception applies only to criminal prosecutions. Indeed, elsewhere in § 230 Congress consistently used the term "enforcement" to refer to Government action in criminal matters, and not to the claims of private litigants in civil litigation. *See, e.g.*, 47 U.S.C. § 230(b)(5) ("It is the policy of the United States . . . to ensure vigorous ***enforcement*** of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer." (emphasis added)); *id.* § 230(e)(3) (providing that the substantive immunities of § 230 do not "prevent any State from ***enforcing*** any State law that is consistent with" § 230 (emphasis added)). For these reasons, the First Circuit recently concluded that "[t]he plain-language reading of [S]ection 230(e)(1) . . . excludes civil suits," and any argument to the contrary is nothing more than an "attempted end run[]" around Section 230 immunity. *Backpage.com*, 817 F.3d at 23–24.

Appellants, for their part, provide no real response. They cite two pieces of legislative history that they claim support the application of a criminal-law exception in this case. *See* Appellants' Br. at 53 (citing Statement of Alan J. Kreczko, S. 2465, Before the Subcommittee on Courts and Administrative Practice (July 25, 1990), https://www.state.gov/documents/organization/28458.pdf; S. Rep. No. 102-342, at 22 (1992)). But that legislative history does nothing of the sort. At no point, for example, in his statement before the Senate Judiciary Committee did Alan Kreczko even remotely suggest that the criminal-law exception to the CDA should be applied to claims brought under a civil-remedies provision. The Senate Report relied on by Appellants similarly lacks any such discussion.

In addition, refusing to apply § 230 to claims for civil liability predicated on a federal criminal statute like the ATA would run counter to other cases addressing this issue, all of which held that the exception in § 230(e)(1) does not apply to civil actions based on statutes with criminal aspects. *See, e.g.*, *Fields*, 200 F. Supp. 3d at 974 (dismissing civil ATA claim on CDA grounds); *Backpage.com*, 817 F.3d at 23 (rejecting argument that civil suit under the Trafficking Victims Protection

Reauthorization Act fell within the criminal law exception); *Obado*, 2014 WL 3778261, at *8 ("[T]he CDA exception for federal criminal statutes applies to government prosecutions, not to civil private rights of action under stat[utes] with criminal aspects.").

Second, Appellants' contention that the CDA and the decisions interpreting it should not apply because they conflict with the later-enacted ATA and the amendments thereto is also meritless. Simply put, there is no conflict between the two statutes: The ATA provides causes of action relating to support of terrorist actions, whereas the CDA provides a limited defense to such causes of actions for claims stemming from a service-provider's decisions to allow, edit, or remove online content created by third-party users. The two laws can be read in harmony. As the District Court put it:

> In enacting Section 230, . . . Congress "was focusing on the particularized problems of [providers and users of interactive computer services] that might be sued in the state or federal courts," *Radzanower* [*v. Touche Ross & Co.*], 426 U.S. [148,] 153 [(1976)], limiting the liability of a narrow subset of defendants for a particular type of claim. Thus, . . . the two acts can be read without any conflict: Section 230 provides a limited defense to a specific subset of defendants against the liability imposed by the ATA.

A417–18 (first set of brackets in original); *accord Gonzalez*, 282 F. Supp. 3d at 1168; *Fields*, 217 F. Supp. 3d at 1124.

Contrary to Appellants' claim, Congress's recent enactment of JASTA confirms the point. *See* 18 U.S.C. § 2333. That law broadened the ATA to include secondary liability. Significantly, however, JASTA and its legislative history make no mention of the CDA or the two decades of precedent interpreting it. Nor does JASTA or its legislative history address the responsibilities of, or protections afforded to, interactive-computer-service providers. Thus, even though Congress was fully aware of the extensive body of CDA precedent that existed at the time, it made no provision in JASTA to overrule that precedent as it related to claims under the ATA, strongly suggesting that Congress fully intended for CDA defenses to remain available in ATA actions. Congress's silence regarding Section 230 speaks even more loudly here because JASTA expressly limited a different statutory immunity—the immunity provided to foreign states under the FSIA. *See* 18 U.S.C. § 2333(d). As the district court noted in *Gonzalez*, JASTA's express repeal of foreign sovereign immunity for certain acts of international terrorism

"demonstrates that where Congress intended JASTA to repeal existing statutory immunities, it made that clear." 282 F. Supp. 3d at 1160.[5]

Third, there is no legal basis for Appellants' assertion that the ATA and its amendments implicitly repealed § 230 of the CDA. As the District Court recognized, courts in this Circuit have long held that "[r]epeals by implication are not favored." A417 (quoting *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d 134, 144 (2d Cir. 2003)). "Accordingly, courts must not 'infer a statutory repeal unless . . . such construction is absolutely necessary in order that the words of the later statute shall have any meaning at all.'" *Id.* (quoting *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007)); *see also Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) ("When confronted with two acts of Congress allegedly touching on the same topic," a court "is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both." (citation omitted)). For the reasons

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[5] It is therefore unsurprising that at least two federal courts applied the CDA to bar civil-ATA claims, both rejecting arguments that JASTA somehow impliedly repealed Section 230. *See, e.g.*, *Fields*, 200 F. Supp. 3d at 966; *Gonzalez*, 282 F. Supp. 3d at 1159–60. This Court should do the same here.

explained above, applying § 230 to ATA actions does not deprive the ATA of "any meaning at all." As noted, "the two acts can be read without any conflict," A418, since the CDA is intended to apply to a limited subset of defendants like Facebook for only those claims that seek to impose liability for third-party content. The ATA, on the other hand, applies in a much broader set of circumstances with no regard for the particular defendant being sued. The ATA, therefore, did not repeal § 230 of the CDA. To conclude otherwise "would treat ***any*** statute that imposes liability and which was enacted after the CDA as implicitly limiting the reach of Section 230" and "would effectively reverse the presumption against inferring repeal." A418.

F. This Court Should Not Except From CDA Coverage Foreign-Law Tort Claims.

Appellants' assertion that New York choice-of-law principles preclude the application of the CDA to Appellants' Israeli-law tort claims is equally flawed. *See* Appellants' Br. at 57–62. Appellants contend that the District Court should not have applied § 230 to claims governed by Israeli law, since the CDA is a U.S. statute that has no corollary in Israel. *Id.* at 62.

That argument is wrong. The CDA on its face applies to foreign-law claims. The text governs any cause of action that would "treat" an interactive-computer-service provider as "the publisher or speaker" of third-party content. 47 U.S.C. § 230(c). It makes no distinction between domestic- and foreign-law claims, nor does the its legislative history suggest any such distinction. The statute also features several express exceptions to its broad provision of immunity, including an exception for criminal laws, *id.* § 230(e)(1), for intellectual property, *id.* § 230(e)(2), for communications privacy laws, *id.* § 230(e)(4), and for child sex trafficking law, FOSTA § 3(a). Yet at no point did Congress exclude from CDA coverage claims arising under the law of foreign nations. Under well-established rules of statutory interpretation, "[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Hillman v. Maretta*, 569 U.S. 483, 496 (2013) (brackets in original) (citation omitted). Common sense only underscores the point: If Appellants' arguments were accepted, U.S. courts would be ***prohibited*** from adjudicating federal and state claims but ***required*** to adjudicate foreign-law claims arising out of the same conduct. Facebook

knows of no other circumstance where American courts face such constraints.

G. This Court Should Reject Appellants' Attempt To Inject New Facts Into The Record On Appeal.

Finally, this Court should decline Appellants' invitation to consider facts never introduced in the Amended Complaint. In reviewing the dismissal of a complaint, appellate courts will consider only the facts alleged in "the complaint . . . , as well as . . . documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Parkcentral Glob. Hub Ltd. v. Porsche Auto. Holdings SE*, 763 F.3d 198, 202 (2d Cir. 2014) (per curiam) (citation omitted). Appellants' brief ignores this foundational rule of appellate practice, referencing a host of new facts that were not considered (and, indeed, could not be considered) by the District Court in granting Facebook's motion to dismiss. *See* Appellants' Br. at 8–11 (referencing a Center for Extremism Project ("CEP") report created in May 2018, 19 months after Appellants filed the Amended Complaint); *id.* at 12–13 (quoting portions of an internal Facebook memorandum written in the Spring of 2018); *id.* at 13 (citing March 2018 news coverage of the internal memorandum).

Because these facts were outside the record considered by the court below, they cannot be considered by this Court on appeal.[6]

II. APPELLANTS' ATA CLAIMS FAIL AS A MATTER OF LAW

Because Appellants' claims are barred by § 230 of the CDA, this Court need not consider the merits of those claims. *See supra* Part I. But even if the CDA did not apply, this Court can nevertheless affirm the District Court's dismissal on alternative grounds because the Amended Complaint does not contain plausible allegations showing that Facebook violated the ATA.[7]

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[6] Of course, even assuming Appellants' new facts could be properly considered by this Court, those facts do nothing to change the fundamental point that Facebook is entitled to CDA immunity in this case. Indeed, the CEP report and internal memorandum simply have no bearing on whether Facebook created or developed the content found on any HAMAS-related account. Nor does the report or memorandum alter the fact that Appellants' claims seek to treat Facebook as the publisher of third-party content.

[7] For the same reasons that Appellants' ATA claims fail as a matter of law, the Amended Complaint also fails to plead plausibly Appellants' Israeli-law claims for negligence, breach of statutory duty, and vicarious liability. As the arguments below make clear, Facebook neither breached any legal duty owed to Appellants nor assisted HAMAS in a manner sufficient to give rise to tort liability under Israeli law.

A. Appellants Have Not Plausibly Alleged That Their Injuries Occurred "By Reason Of" Facebook's Activities.

All four of Appellants' ATA claims fail because they have not plausibly alleged that their injuries occurred "by reason of" Facebook's activities. The civil-remedies provision of the ATA, pursuant to which Appellants brought Counts I through IV of the Amended Complaint, creates a private cause of action for "[a]ny national of the United States injured in his or her person, property, or business ***by reason of*** an act of international terrorism." 18 U.S.C. § 2333(a) (emphasis added). As Appellants acknowledge, this Court has interpreted § 2333's "'by reason of' language" to mean that the ATA "restricts the imposition of . . . liability [under the statute] to situations where plaintiffs plausibly allege that defendant[']s actions proximately caused their injuries." *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 118, 123–25 (2d Cir. 2013) (*citing Rothstein v. UBS AG*, 708 F.3d 82, 94–97 (2d Cir. 2013)); Appellants' Br. at 40. To prove proximate causation, Appellants must plausibly allege that Facebook's activities were "a substantial factor in the sequence of responsible causation," and that Appellants' injuries were "reasonably foreseeable or anticipated as a natural consequence" of

Facebook's alleged violation. *Strauss v. Credit Lyonnais, S.A.*, 925 F. Supp. 2d 414, 432 (E.D.N.Y. 2013) (citations omitted); *see also Rothstein*, 708 F.3d at 91–92 (instructing that defendant's alleged violation must "le[a]d directly to the plaintiff's injuries" to show proximate causation (citation omitted)).

Applying these well-settled principles here, Appellants have failed to allege adequately proximate causation under the ATA. The Amended Complaint does not contain a single allegation that ties terrorism-related content allegedly posted by HAMAS to the particular attacks at issue. Nor is there any allegation indicating that any of Facebook's actions "led directly" to the terrorist attacks that are the subject of Appellants' claims. *Rothstein*, 708 F.3d at 91–92 (citation omitted). The Amended Complaint likewise does not set forth facts suggesting that Facebook "was a participant in the terrorist attacks that injured plaintiffs" and their loved ones, or that Facebook funded those attacks. *Id.* at 97. At most, all Appellants can muster on this score is that HAMAS "us[ed] Facebook before, during, and after each attack." Appellants' Br. at 41. But such allegations do not come close to satisfying Appellants' burden to plead plausible allegations that Facebook was "a substantial factor" in causing

Appellants' injuries. *See, e.g.*, *In re Terrorist Attacks*, 714 F.3d at 124 (rejecting the suggestion that "providing routine banking services to organizations and individuals said to be affiliated with al Qaeda—as alleged by plaintiffs—proximately caused the September 11, 2001 attacks").

The Ninth Circuit's decision in *Fields* underscores this point. 881 F.3d at 745–46. In *Fields*, the appellants claimed that Twitter should be liable for an ISIS attack because Twitter "knowingly provided" Twitter accounts to ISIS as a tool for "communicat[ing] with potential recruits and 'for fundraising and operational purposes.'" *Id.* at 742–43. The Ninth Circuit rejected that claim, opining that "[a]ppellants have not pleaded that Twitter's provision of communication equipment to ISIS, in the form of Twitter accounts and direct messaging services, had any direct relationship with the injuries that [appellants] suffered." *Id.* at 749. The court affirmed the dismissal of the action because "[a]t most, the [complaint] establishes that Twitter's alleged provision of material support to ISIS facilitated the organization's growth and ability to plan and execute terrorist acts. But the [complaint] does not articulate any connection between Twitter's provision of [its services] and [appellants]'

injuries." *Id.* at 749–50. Here, too, Appellants have altogether failed to connect Facebook to the causal chain of the specific HAMAS terror attacks at issue or to the operatives that executed those attacks. For that reason, the District Court correctly dismissed all four of Appellants' ATA claims.

B. The Amended Complaint Does Not Plausibly Allege Direct Liability For An "Act Of International Terrorism."

Appellants' Counts III and IV for direct liability independently fail because there are no allegations in the Amended Complaint sufficient to state a claim that Facebook violated either material support statute. Section 2339A, upon which Count III rests, requires a showing that the defendant provided material support "***knowing*** . . . that [it is] to be used in preparation for, or in carrying out [an act of terrorism]." 18 U.S.C. § 2339A(a) (emphasis added). Section 2239B, upon which Count IV rests, similarly requires that a defendant "***knowingly*** provide[d] material support" to a designated foreign terrorist organization. *Id.* § 2339B. Appellants have not plausibly pled the requisite knowledge under either provision.

The thrust of Appellants' knowledge allegations is that Facebook was aware that its services would be used in carrying out terrorism because Facebook purportedly failed to scrub its platform of terrorism-related content. *See* Appellants' Br. at 38–39; A34–37 ¶¶ 121–29. But conspicuously absent from the Amended Complaint is a single allegation that Facebook knew of and failed to take action against an account used by HAMAS itself. Nor do Appellants provide factual support for the proposition that Facebook knew that it was providing its services to the members of HAMAS who perpetrated the specific attacks at issue. To the contrary, and as Appellants' own allegations make clear, Facebook routinely removes terrorist content, and Facebook has publicly stated that it "do[es]n't allow terrorist groups," including HAMAS, "to be on Facebook." A121–23 ¶¶ 548–54. Indeed, Appellants themselves quote the following statement made by an undisclosed Facebook representative: "We want people to feel safe when using Facebook. There is no place for content encouraging violence, direct threats, terrorism or hate speech on Facebook." A114 ¶ 506. These allegations cannot possibly support an inference that Facebook knowingly provided material support

to HAMAS and its operatives in the execution of the terrorist attacks described in the Amended Complaint.[8]

C. Appellants' Secondary Liability Theory Under The ATA Fails As A Matter Of Law.

Appellants' claims for secondary liability under the ATA are similarly flawed. That statute provides for such liability "[i]n an action . . . for an injury arising from an act of international terrorism committed, planned, or authorized by an organization that had been designated as a foreign terrorist organization . . . as to any person who aids and abets, by knowingly providing substantial assistance, or who conspires with the person who committed such an act of international terrorism." 18 U.S.C. § 2333(d)(2). For at least three independent reasons, Appellants cannot satisfy these stringent requirements.

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[8] Appellants also set forth in their proposed Second Amended Complaint a cause of action under 18 U.S.C. § 2339C(c) for Facebook's alleged "concealment" of its provision of material resources to HAMAS. *See* A225. But for the reasons already explained, that claim also fails as a matter of law. Indeed, as Facebook explained in its supplemental opposition to Appellants' motion for leave to amend the complaint, Appellants cannot adequately allege (1) a predicate violation of § 2339B, and (2) the requisite knowledge or intent. *See* Dist. Ct. ECF No. 60 at 1.

First, Appellants cannot establish that Facebook provided "substantial assistance" to HAMAS in connection with any of the attacks at issue. Under JASTA, substantial assistance is determined by assessing six factors: "the nature of the act encouraged; the amount [and kind] of assistance given; the defendant's absence or presence at the time of the tort; his relation to the tortious actor;" "the defendant's state of mind"; and the "duration of the assistance provided." *Halberstam v. Welch*, 705 F.2d 472, 483–84 (D.C. Cir. 1983) (brackets in original) (emphasis omitted); *see also* JASTA, Pub. L. No. 114-222, § 2(a)(5), 130 Stat. at 852 (stating that Congress intended secondary liability under the ATA to be interpreted in accordance with *Halberstam*, 705 F.2d 472). In this case, none of these factors indicate that Facebook provided HAMAS with "substantial assistance" to any specific underlying terrorist attack merely by making its services freely available to the public at large.

Most importantly, the Amended Complaint does not contain a single allegation that the five attacks at issue were planned, financed, or executed through Facebook. Nor do Appellants allege (because they cannot allege) that Facebook had any relationship whatsoever with the perpetrators of the first terrorist attack mentioned in the Amended

Complaint, *see* A45–46 ¶¶ 177–82. And the company's only relationship with the remaining perpetrators was merely as a social network provider to its registered users, *see id.* ¶¶ 156–218, not anything related to the attacks themselves. That kind of affiliation, which Facebook shares with billions of people, is not the connection necessary to establish "substantial assistance" under the ATA. *Halberstam*, 705 F.2d at 482.

Second, Appellants have failed to include plausible allegations that Facebook acted with the requisite state of mind. *See* 18 U.S.C. § 2333(d)(2) (providing for secondary liability as to "any person who aids and abets, by ***knowingly*** providing substantial assistance." (emphasis added)). There is no allegation in the Amended Complaint that Facebook had advance knowledge of the perpetrators or the specific terrorist attacks at issue here—a failure that, standing alone, is fatal to their aiding and abetting claim. Appellants do not even allege that Facebook ever knew of an account that HAMAS controlled in its own name. Nor do Appellants provide factual support for the proposition that Facebook knew that it was providing its services to the various members of HAMAS who perpetrated the specific attacks alleged.

The Amended Complaint instead proves the opposite—that the only relevant intent Facebook had was to prohibit and remove terrorist content when such content came to its attention. For example, Facebook's Community Standards, which Appellants' repeatedly reference, explain that Facebook "do[es] not allow any organizations or individuals that are engaged in," among other things, "[t]errorist activity" or "[m]ass or serial murder" to "have a presence on Facebook." Facebook, *Community Standards*, https://www.facebook.com/communitystandards/ (last accessed Oct. 2, 2018). Facebook's Terms of Service make the same point, noting that users may not use Facebook "at the expense of the safety and well-being of others or the integrity of [the Facebook] community." Facebook, *Terms of Service*, https://www.facebook.com/terms.php (last accessed Oct. 2, 2018). Elsewhere in the Terms of Service, Facebook states that the company will "remove content" and "take action against [an] account" that is "unlawful." *Id.* Similarly, Facebook provides that "[i]f [it] determine[s] that [a user] ha[s] violated [the Company's] terms or policies, [Facebook] may take action against [the user's] account to protect [the] community and services, including by suspending access to [the user's] account or

disabling it." *Id.* The Amended Complaint contains no allegations explaining how Facebook was "knowingly" supporting terrorists when it clearly and expressly disclaimed doing so.

Third, Appellants have not plausibly alleged that Facebook conspired with HAMAS and its operatives. Appellants concede that a claim for civil conspiracy under the ATA requires "an agreement to do an unlawful act or a lawful act in an unlawful manner; an overt act in furtherance of the agreement by someone participating in it; and injury caused by the act." Appellants' Br. at 42–43 (quoting *Halberstam*, 705 F.2d at 487). In addition, where, as here, there is no direct evidence of an agreement to conspire, courts typically "look to see if the alleged joint tortfeasors are pursuing the same goal—although performing different functions—and are in contact with one another." *Halberstam*, 705 F.2d at 481. Appellants have proffered no such facts in this case, and instead rely on threadbare and conclusory allegations that "Facebook permitt[ed] or re-establish[ed] Hamas accounts after briefly shutting them down." Appellants' Br. at 43. Appellants do not (again, because they cannot) allege that Facebook entered into any agreement with HAMAS or is

pursuing the same goal as HAMAS—i.e., to commit terrorism. Accordingly, Count II of the Amended Complaint fails as a matter of law.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the District Court.

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Respectfully submitted,

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